

TERESA PURINTON
Claimant

U.S.D. #231

AND

Docket No. 267,789

ORDER

Respondent requests review of a preliminary Order entered by Administrative Law Judge Robert H. Foerschler on October 11, 2001.

The Administrative Law Judge entered a Preliminary Supplemental Order dated October 11, 2001, which awarded claimant 12 weeks of temporary total disability compensation from the date of the preliminary hearing on September 13, 2001.

Respondent contends the Administrative Law Judge exceeded his jurisdiction by admitting into evidence and considering the authorized treating physician's off work restrictions which claimant's attorney faxed to the Administrative Law Judge the day after the preliminary hearing. Respondent contends such procedure is violative of respondent's due process rights to hearing and cross-examination.

Claimant contends the Board does not have jurisdiction to hear respondent's appeal. Claimant initially notes that there is no dispute as to the compensability of the claim and a determination of entitlement to temporary total disability compensation is not an issue subject to appeal from a preliminary order. In the alternative, claimant argues respondent's due process was not violated because respondent acknowledged the Administrative Law Judge left the record open for receipt of the off work slip.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the record compiled to date, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant sustained a work-related injury on May 8, 2001. On September 13, 2001, a preliminary hearing was held and the only issue was whether claimant was entitled to temporary total disability compensation from her last day worked for respondent on June 1, 2001, through the hearing date.

Respondent argued claimant was not entitled to temporary total disability compensation for that time period because claimant, a food service worker for respondent, would not have been working during the summer while school was out. Respondent further argued that when school started in August respondent would have accommodated claimant's restrictions.

At the preliminary hearing, the claimant testified that Dr. Lanny Harris, the authorized treating physician, performed surgery on her arm the day before the preliminary hearing and had taken her off work. Respondent objected to that testimony and the Administrative Law Judge noted that a report could be obtained from Dr. Harris. Later, the Administrative Law Judge specifically commented:

THE COURT: I don't know if that is the current law, but I will give it some consideration. I am expecting that there is going to be a provision of this document or whatever. I suspect that what it is is those forms that the doctor tells them to go over with you when you leave the surgery. It is not really -- I don't think it is what we would normally consider an off-work status report or off-work slip. It is directions to the patient as what to do post-op. I will see what it is anyway. Anything further?¹

At the conclusion of the hearing, the Administrative Law Judge took the matter under advisement and again inquired of claimant's counsel whether Dr. Harris' report could be provided. Claimant's counsel noted it could be faxed.

The Administrative Law Judge's file contains the work status report dated September 13, 2001, and signed by Dr. Harris which indicates claimant was taken off work for 12 weeks but could return to one-handed work, if available, in 2 weeks.

On September 17, 2001, the Administrative Law Judge entered a Preliminary Decision which awarded temporary total disability compensation from June 1, 2001, through July 2, 2001. The decision further noted claimant had surgery the day before the

¹Transcript of Proceedings, September 13, 2001, at 21-22.

hearing and the matter of additional temporary total disability would be deferred pending further clarification and evidence. Although the work status report was faxed to the Administrative Law Judge, the language of the September 17, 2001, Preliminary Decision indicates the Administrative Law Judge did not see the report until after that decision was entered.

In a letter to the Administrative Law Judge, dated September 19, 2001, respondent's counsel acknowledged the record had been left open for submission of Dr. Harris' work status report and noted that its weight should be limited because it appeared to have been filled out by two different authors.

On October 11, 2001, the Administrative Law Judge entered the Preliminary Supplemental Order, which is the subject of the instant appeal. In the Order, the Administrative Law Judge noted his September decision incorrectly indicated the treating physician was Dr. Jones rather than Dr. Harris. The Administrative Law Judge further noted that because Dr. Harris had released claimant from work for 12 weeks the respondent was ordered to pay claimant temporary total disability compensation for that time period.

This is an appeal from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:²

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.³ Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.⁴

²K.S.A. 44-534a.

³K.S.A. 44-551.

⁴See Taber v. Taber, 213 Kan. 453, 516 P.2d 987 (1973); Provance v. Shawnee Mission U.S.D. No. 512, 235 Kan. 927, 683, P.2d 902 (1984).

An Administrative Law Judge has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, Judge Foerschler did not exceed his jurisdiction. The issue of whether claimant's medical condition and employment situation entitles claimant to receive temporary total disability benefits is not an issue that is reviewable from a preliminary hearing order. At this juncture of the proceeding, the Board does not have the authority to reweigh the evidence and redetermine if claimant is temporarily and totally disabled.

The respondent contends the Administrative Law Judge exceeded his jurisdiction when he considered the medical report that was not submitted until after the conclusion of the preliminary hearing. Respondent argues it was denied a hearing and the opportunity to cross-examine the witness which violates its due process rights.

Workers compensation proceedings have been and remain adversarial proceedings. Roberts v. J.C. Penney Co., 263 Kan. 270, 281, 949 P.2d 613 (1997). Although not bound by the technical rules of procedure, the Administrative Law Judge is required to give the parties a reasonable opportunity to be heard and to present evidence, to ensure the employee an expeditious hearing and to act reasonably without partiality.⁵

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity. Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System, 205 Kan. 780, 473 P.2d 72 (1970). The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process. Wulfkuhle v. Kansas Dept. of Revenue, 234 Kan. 241, 671 P.2d 547 (1983).

In Adams v. Marshall, 212 Kan. 595, 601-602, 512 P.2d 365 (1973), the Kansas Supreme Court stated:

"In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They

⁵K.S.A. 44-523(a).

must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . '

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur.2d, Administrative Law, § 412, p. 222:

' . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . .''

The preliminary hearing in this matter was limited to the issue of claimant's entitlement to temporary total disability compensation. Respondent was afforded a hearing on that matter and had ample opportunity to cross-examine the witnesses and even proffered its own evidence through its witness. Respondent was clearly afforded a hearing on the issue of claimant's entitlement to temporary total disability compensation.

It should be noted that although respondent objected to claimant testifying about the contents of the treating physician's work status report it did not object when the Administrative Law Judge took the matter under advisement and requested that the report be faxed to the court. Moreover, the respondent did not request the opportunity to provide rebuttal evidence. Lastly, it should be noted that at preliminary hearing such medical reports may be considered without the supporting testimony of the physician.⁶

The Board concludes the Administrative Law Judge did not exceed his jurisdiction when he took the matter under advisement pending proffer of the treating physician's work status report.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁷

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Robert H. Foerschler dated October 11, 2001, remains in full force and effect.

IT IS SO ORDERED.

⁶K.S.A. 44-519 and K.A.R. 51-3-5a.

⁷K.S.A. 44-534a(a)(2).

Dated this _____ day of December 2001.

BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director